Supreme Court, U.S.
FILED
DEC 21 2006
OFFICE OF THE CLERK

No. 06-878

In The

Supreme Court of the United States

GERCIE BROOKS, Individually and as Representative of the Estate of JOHN B. BROOKS, JR., Deceased,

Petitioner,

v.

ARMCO, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Sixth Court Of Appeals, Texarkana, Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Sixth Court of Appeals of Texarkana, Texas committed error in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and the Equal Protection Clause of the United States Constitution by affirming the trial court's decision to restore to defendant a peremptory strike, when the court had concluded that defendant used that strike impermissibly to remove a prospective juror on the basis of race.

(2) Whether the Sixth Court of Appeals erred in engaging in a harmless error analysis, in affirming the trial court's decision to restore a peremptory strike to a party that impermissibly removed a prospective juror on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Sixth Court of Appeals of Texarkana, Texas (App. 1 – App. 10), is reported at 194 S.W.3d 661 (Tex. App. – Texarkana 2006). The Supreme Court of Texas denied review of the court of appeals' decision without opinion (App. 13) on September 22, 2006. The trial court entered judgment for defendant on July 12, 2004 (App. 11 – App.12).

JURISDICTION

The Supreme Court of Texas denied review of the court of appeals' decision on September 22, 2006 (App. 13).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

This case raises important, recurring questions about what constitutes a constitutionally permissible remedy for a *Batson/Edmonson* violation and whether in reviewing

such a remedy is proper to engage in a harmless error analysis. In *Batson*, this Court determined that, "[i]n light of the variety of jury selection practices followed in our state and federal trial courts," the Court would "make no attempt to instruct these courts how best to implement [its] holding. . . ." 476 U.S. at 99 n.24. However, since then, state courts have struggled to determine whether reinstatement of a peremptory challenge used in a racially impermissible manner is constitutionally sound. *See, e.g., Peetz v. State*, 180 S.W.3d 755, 761 (Tex. App. – Houston [14th Dist.] 2005); *People v. Johnson*, 765 N.Y.S.2d 199 (N.Y. Sup. Ct. 2003). *Cf. United States v. Ramirez-Martinez*, 273 F.3d 903 (9th Cir. 2001). Further, although this Court has noted that harmless error analysis is inappropriate when race is impermissibly used in the selection of a grand jury, *see Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 294 (1991), the question of whether *Batson/Edmonson* error is subject to harmless error analysis has never been definitively decided by the Court, leaving the federal appellate and state courts to fill the void. And, while application of harmless error analysis in the *Batson/Edmonson* context "has been resoundingly rejected by every [federal] circuit court that has considered the issue," *United States v. McFerron*, 163 F.3d 952, 955-56 (6th Cir. 1998), there is disagreement in the state courts. In this case, for example, the Sixth Court of Appeals determined that even if there was error, it was harmless. *See* 194 S.W.3d at 667 (App. 9).

I. The *Batson/Edmonson* Hearing in the Trial Court

The issues raised by this petition originated in a personal injury lawsuit filed by Johnny Brooks, arising from his death from mesothelioma, "a cancer caused exclusively by inhalation of asbestos fibers." *Rotondo v. Keene Corp.*, 956 F.2d 436, 437 (3d Cir. 1992). Mr. Brooks worked as a laborer and bricklayer at defendant Armco Steel for about 20 years, *see* 3 RR 190,[1] pulling out insulation and brickwork from Armco's furnaces, laying bricks, and mixing mortar. 4 RR 11, 18, 30-31. The mortar, block insulation, and pipe-covering used at Armco contained asbestos. 4 RR 16, 20, 24. Mr. Brooks worked with these asbestos materials on a daily basis. 4 RR 39. Armco never warned its employees about the hazards of asbestos. 4 RR 37-38.

On July 18, 1997, Mr. Brooks passed away from peritoneal mesothelioma. Mr. Brooks' case went to trial on June 4, 2004. *See* 4 RR 137-38. After the parties exercised their peremptory strikes during jury selection, plaintiffs brought a *Batson/Edmonson* challenge. Plaintiffs, who are African-American, argued that Armco had exercised four of its six peremptory strikes to exclude four of six African-American venire members. 2 RR 102. Armco, when given the opportunity to provide race-neutral reasons for striking the panelists, explained that it struck one panelist because "her juror questionnaire was wholly inadequate"

[1] "CR" refers to the Clerk's Record for the 6th District Court, which was delivered to the Sixth Court of Appeals and filed there on November 29, 2004. References to "RR" are to the Reporter's Record, which was filed in the Sixth Court of Appeals on September 27, 2005.

and she "worked in a school setting." 2 RR 105. It struck another venire member because she was "shaking her head in disgust at various things." *Id.* The basis for another strike was that the panelist "appeared not to be listening." 2 RR 106-07. Finally, with respect to Kasonya Hicks, defense counsel explained, "she just didn't seem like she was very pleased at all being questioned by [defense counsel]. And we basically struck her because of the attitude she exhibited towards our side of the case." 2 RR 106. Defense counsel also explained that it struck Ms. Hicks because she "is involved in an area of the medical field." *Id.* Counsel admitted, however, that "we did leave other people on that were in the medical field." *Id.*

The trial court overruled plaintiffs' *Batson/Edmonson* challenge as to three of the veniremembers, but granted it as to Kasonya Hicks. 2 RR 111-12. Specifically, the trial court noted, "I'm going to overrule it as to – overrule Batson and find that there was a race neutral objection to the following jurors: Pamela Cooper, Edna King, and Patricia Taylor. And I'm going to grant it as to Kasonya Hicks and ask that she be restored to the jury and the last juror be alleviated." *Id.* After Ms. Hicks was restored to the jury, defendant then objected that it should receive another peremptory strike. 2 RR 119. The court restored defendant's peremptory strike. 2 RR 120.

Plaintiffs objected to the court providing an extra peremptory strike to the defense and requested an additional strike for plaintiffs, stating, "Your Honor, plaintiffs would request an additional peremptory strike for their use and would object to providing an extra peremptory strike to the defense." 2 RR 121. Defense counsel explained, "This is not an extra peremptory strike. It's a restored peremptory strike." *Id.* The trial court told

defense counsel, "Make your strike." *Id.* Plaintiffs' counsel asked, "Is my objection overruled?" The trial court responded, "It's overruled." *Id.* In other words, the court overruled the objection and denied plaintiffs' request for an additional peremptory strike. The panel was then brought in and the trial proceeded. *Id.* Thereafter, the jury returned a defense verdict and judgment was entered thereon. 1 CR 90 (App. 11 – App. 12).

II. The Court of Appeals' Decision

Petitioners appealed, arguing, among other things, that the trial court violated *Batson/Edmonson* and the Equal Protection Clause in granting defendant an extra peremptory strike to replace the strike defendant used impermissibly to remove a prospective juror on the basis of race. In reply to defendant's arguments in response that any error was harmless, petitioners cited to a Texas criminal case, *Batiste v. State*, 888 S.W.2d 9, 13-14 & n.13 (Tex. Ct. Crim. App. 1994), which noted that court's doubt that "the Supreme Court will change its view of the susceptibility of jury selection procedures that violate equal protection to harmless error analysis" and assumed, without deciding, "that *Batson* error is not amenable to a *Chapman [v. California*, 386 U.S. 18 (1967)] analysis for harmless error."

The Sixth Court of Appeals of Texarkana, Texas affirmed the trial court's ruling. The court of appeals found that "the evidence before the trial court in the *Edmonson* hearing could reasonably have been construed by the trial court as showing that the improperly struck juror was not excluded because of deliberate prejudice against African-Americans, but, rather, as a result of an error of judgment

as to what properly constituted race-neutral reasons." 194 S.W.3d at 666 (App. 8). The court ruled that given this "error in judgment," the "policy of this State that both parties be allowed no fewer peremptory challenges than the minimum number allowed them by our rules and statutes" would prevail. *Id.* at 666-67 (App. 8). The court also rejected plaintiffs' citation to *Batiste v. State* as inapposite because it determined that the jury in the case was not selected by racially discriminatory means. *Id.* at 667 (App. 9 – App. 10). The court therefore held that even if it was error for the trial court to replace defendant's peremptory challenge, "it was clearly harmless." *Id.*

Thereafter, petitioners filed a timely petition for review to the Texas Supreme Court. That court denied review on September 22, 2006. (App. 13).

REASONS FOR GRANTING THE PETITION

In affirming the trial court's ruling, the Sixth Court of Appeals decided an important question of constitutional law in a way that conflicts with this Court's relevant rulings on *Batson* and *Edmonson* violations. Specifically, in affirming the reinstatement of a peremptory challenge used for the purposes of racial discrimination, the court of appeals undermined the purposes behind *Batson* and *Edmonson*, ignoring this Court's clear precedent establishing the relationship between the appearance of racial discrimination in jury selection and the integrity of the court system. Further, the court of appeals' decision illustrates the murkiness that continues to exist with respect to whether harmless error analysis should be

applied when considering error arising in the course of a *Batson/Edmonson* challenge. As set forth above, although the vast majority of federal appellate courts have ruled after *Vasquez*, *supra*, and *Arizona v. Fulminante*, *supra*, that *Batson/Edmonson* errors are not subject to a harmless error analysis, the court of appeals in this case nevertheless applied such an analysis. For these reasons, and as elaborated below, petitioners urge the Court to grant this petition for a writ of certiorari in order to (1) provide guidance to the state courts on constitutionally permissible remedies of violations of *Batson* and *Edmonson*; and (2) definitively establish that application of harmless error analysis is not permissible when *Batson/Edmonson* error has been committed.

I. The Court of Appeals' Affirmance of the Practice of Restoring Peremptory Strikes Used Impermissibly to Discriminate on the Basis of Race Ignores this Court's *Batson* and *Edmonson* Jurisprudence

This petition for a writ of certiorari raises an issue that is of substantial importance because it implicates an issue of constitutional law and affects the integrity of the courts. Specifically, this Court has determined that "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Thus, a court must take utmost care not to involve itself with any discriminatory act. In *Edmonson v. Leesville Concrete Co.*, *supra*, the Court noted:

> By enforcing a discriminatory peremptory challenge, the court has not only made itself a party

> to the biased act, but has elected to place its power, property and prestige behind the alleged discrimination. In so doing, the government has created the legal framework governing the challenged conduct, and in a significant way has involved itself with invidious dis rimination.

500 U.S. at 624 (internal citations and alterations omitted). Here, the trial court committed constitutional error by enforcing defendant's discriminatory challenge. The court's decision legitimized such discrimination because reinstatement of the discriminatory peremptory strike ensured that defendant suffered no penalty for discriminating. Under the course followed by the trial court, a party never loses by challenging a venire-person based on race. If that party convinces the court of a race-neutral reason for exercising its strike, then the venire-person is excluded. Even if the party does not prevail, it has another peremptory strike. Thus the court involved itself in discrimination here by rewarding defendant's discriminatory behavior.

This illegitimate involvement in discrimination has two unwelcome results. First, it undermines this Court's decisions in *Batson* and *Edmonson*. Here, by allowing defendant to enjoy the benefit of its racially-motivated peremptory strike, the trial court essentially undid its own *Batson/Edmonson* ruling. The court of appeals' decision allows this error to stand.

In order to properly abide by *Batson* and *Edmonson*, the court should have refused to restore the racially discriminatory strikes. Another Texas Court of Appeals has noted:

> Were we to accept [the rule that a party who violates *Batson* should have peremptory strikes restored], we would undermine *Batson*, as there would be no consequence for racially-motivated strikes. If a trial court refuses to restore misused strikes, litigants truly face a consequence and are less likely to engage in improper, racially-motivated behavior.

Peetz v. State, 180 S.W.3d 755, 761 (Tex. App. – Houston [14th Dist.] 2005). Reinstating peremptory strikes to a party that has exercised those strikes in a racially discriminatory manner guarantees that a party that discriminates on the basis of race suffers no consequences. The trial court's ruling in this case therefore defies the purposes behind *Batson* and *Edmonson*.

The court's decision to reinstate a racially-motivated peremptory strike also undermines the integrity of the judicial system. This Court has made clear that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers*, 499 U.S. at 402. As the *Edmonson* court noted:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than the courtroom, where the law itself unfolds. . . .
>
> Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.

500 U.S. at 628. When a court condones a party's racially discriminatory use of a peremptory challenge, this sends a message to the jury and public that such discrimination is acceptable. The court becomes an "accomplice" in the racially discriminatory exercise of peremptory strikes and legitimizes the invasion of constitutional rights. *See* Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1118 (1994). For this reason, this Court has mandated that "courts are under an affirmative duty to enforce the strong ... constitutional policies" embodied in the prohibition against race discrimination in the selection of jurors. *Powers*, 499 U.S. at 416. When the trial court restored defendant's racially-motivated peremptory challenge, it violated the precepts underpinning *Batson* and *Edmonson*, became an accomplice in defendant's discrimination, and undermined the confidence of the jury and the public.

The issue raised by this appeal therefore involves an important constitutional issue that affects the integrity of our courts. If the practice of allowing trial courts to reinstate peremptory challenges to parties that have used such challenges in a racially discriminatory manner is condoned, the purposes behind *Batson*, *Edmonson*, and the Equal Protection Clause are essentially vitiated. Further, as set forth above, the practice calls into question the integrity of the courts, since parties who engage in racial discrimination in jury selection essentially face no consequences for their illegitimate behavior and jurors may come to distrust a judiciary that participates in such discrimination by rewarding it.

II. State and Federal Courts Require Guidance in Dealing with the Important Constitutional Issue Raised by Whether Racially-Motivated Peremptory Strikes Should Be Restored

A. Trial Courts Have Reached Different Conclusions with Respect to this Issue

Because of differing state practices, it has generally made sense for this Court to allow wide latitude to trial courts to determine a proper remedy for *Batson/Edmonson* violations. But there is very little specific jurisprudence on the issue of reinstatement of racially-motivated peremptory strikes, and trial courts have come to varying conclusions on the constitutional propriety of this practice. For example, although the trial court here allowed the practice, another Texas trial court refused to restore peremptory strikes to a party who used those strikes in a racially discriminatory manner. *See Peetz v. State*, *supra*, 180 S.W.3d 755. In contrast to the Sixth Court of Appeals' decision in this case, the Fourteenth Court of Appeals of Houston, Texas, agreed that this refusal to reinstate peremptory challenges that violate *Batson* was the constitutionally proper manner in which to deal with the issue. *Id.* at 760-61.

Similarly, a New York trial court, dealing with the same issue, has ruled that if a court finds purposeful discrimination in violation of *Batson*, "it should permanently disallow the challenge and seat the juror because returning the party to its original position would not deter subsequent discriminatory strikes. Accordingly, since the court's goal is to eliminate discrimination, refusing to reinstate the peremptory challenge . . . is not only appropriate, but necessary." *People v. Johnson*, *supra*, 765 N.Y.S.2d at 201. Although the court came to this conclusion after considering "relevant factors" such as the goals

of *Batson* and public policy, it noted "the lack of case law concerning this particular issue." *Id.*

Yet another trial court in California – a federal district court – came to a similar conclusion as the trial court in this case, restoring to a prosecutor in a criminal action peremptory challenges that the prosecutor had used in violation of *Batson*. The Ninth Circuit affirmed the trial court's decision to restore the peremptory challenges. *United States v. Ramirez-Martinez*, 273 F.3d at 910.

Thus, there is considerable confusion in both state and federal trial courts as to whether it is constitutionally permissible to restore peremptory strikes that have been used impermissibly to discriminate on the basis of race. There is also very little guidance on this matter. The importance of this Court's *Batson* and *Edmonson* jurisprudence hangs in the balance.

B. The Lack of Clarity on this Issue Is Eroding this Court's *Batson* and *Edmonson* Jurisprudence

The decision in this matter and the Ninth Circuit's opinion in *Ramirez-Martinez* illustrate how *Batson* and *Edmonson* have been eroded. The purpose of *Batson* and *Edmonson* is to root out the purposeful use of racial discrimination in the selection of petit juries. *Batson*, *supra*, 476 U.S. at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."). In other words, when a court determines that a *Batson* or *Edmonson* violation has taken place, it is because, ostensibly, the party opposing the strike has carried its burden of showing purposeful

discrimination. *Purkett v. Elem*, 514 U.S. 765, 767 (1995). However, according to the opinion in this case, a *Batson* violation could be predicated equally on a finding of deliberate discrimination or on "an error of judgment as to what properly constituted race-neutral reasons." 194 S.W.3d at 666 (App. 8). In its opinion, the court of appeals suggests that the trial court granted the *Batson* challenge in this case because defendant did not understand what kind of pretextual reasons it had to provide. For the court of appeals to suggest that the violation was due to such an "error in judgment" completely ignores well-established *Batson/Edmonson* jurisprudence and encourages discrimination because it suggests that if a party can come up with "after-the-fact rationalizations for challenges which appear to have been made on subconsciously racial grounds," Ogletree, 31 AM. CRIM. L. REV at 1107, the grant of a *Batson/Edmonson* challenge would be inappropriate.

In fact, under *Batson* and *Edmonson* and their progeny, the burden on the party that used its peremptory strike in an allegedly discriminatory fashion is very low. The "legitimate" reason for use of the peremptory challenge need not be "a reason that makes sense"; it need only be "a reason that does not deny equal protection." *See Purkett, supra*, 514 U.S. at 769. The law demands only an explanation that is "facially neutral." *Id.* at 767-78. Thus, for the court of appeals to intimate that a *Batson/Edmonson* challenge was granted here because the defendant could not come up with a better explanation ignores the very low standard placed on the party defending against such a challenge.

Furthermore, this effort to justify the trial court's decision disregards the fact that when a court finds a

Batson/Edmonson violation, it is finding purposeful discrimination, not a lack of a decent explanation. In *Miller-El v. Dretke*, 545 U.S. 231, 233 (2005), the Court noted that "[a] *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." The court of appeals' efforts to weaken the trial court's finding of a *Batson/Edmonson* violation undermines this Court's jurisprudence and cynically suggests the *Batson* challenge was granted here because defendant was too inept to hide its discrimination.

In *Ramirez-Martinez*, *supra*, the Ninth Circuit ruled that it was permissible to reinstate the racially-motivated peremptory challenges because there was no evidence of "egregious bad faith or maliciousness on the part of the prosecutor." 273 F.3d at 201. However, *Batson* does not require maliciousness. The point of *Batson*, *Edmonson*, and their progeny is that purposeful discrimination is harmful to all parties to a lawsuit as well as to the integrity of the court system. Whether that discrimination is due to ignorance or maliciousness is irrelevant. Again, so long as the trial court determines that there was such discrimination, all of the evils discussed in *Batson*, *Edmonson*, *Powers*, and like cases are present. Appellate courts reviewing the decisions of trial courts should not be allowed to undermine the finding of a *Batson* or *Edmonson* violation – a finding of purposeful discrimination – in order to justify remedies that do not comport with the policies underlying this Court's *Batson* jurisprudence.

III. The Court of Appeals' Opinion Reveals Confusion about this Court's Harmless Error Jurisprudence

The court of appeals also erred in this case by applying a harmless error analysis. The court of appeals' opinion suggests that a harmless error analysis is appropriate here because such an analysis has been applied in cases dealing with allocation of peremptory strikes. 194 S.W.3d at 666-67 (App. 9 – App. 10).

In the first instance, this conclusion is incorrect because it ignores this Court's clear mandate that equal protection take priority over the right to peremptory strikes. The court of appeals cites to three Texas cases that focus on a party's right to peremptory strikes: *Perez v. State*, 171 Tex. Crim. 505, 351 S.W.2d 234 (1961), *Truong v. State*, 783 S.W.2d 904 (Tex. App. – Houston [14th Dist.] 1989), and *Curry v. Bowman*, 885 S.W.2d 421 (Tex. Crim. App. 1993); *see* 194 S.W.3d at 667 (App. 8 – App. 9). However, this Court has consistently held that equal protection rights trump law and policy favoring peremptory challenges. As Justice Goldberg put it in his dissent in *Swain v. Alabama*, 380 U.S. 202, 244 (1965), "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." (quoted in *Miller-El v. Dretke*, 545 U.S. at 273 (Breyer, J., concurring)); *see also Powers*, 499 U.S. at 415 ("In *Holland [v. Illinois*, 493 U.S. 474 (1990)] and *Batson* . . . we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality."); *Batson*, 476 U.S. at 108 (Marshall, J., concurring). Thus, the court of appeals' effort to find a

basis for its holding by citing to the "policy of this State that both parties be allowed no fewer peremptory challenges than the minimum number allowed them by our rules and statutes" is fundamentally flawed because it ignores this Court's precedent.

Indeed, the court of appeals' citation to three Texas cases that apply a harmless error analysis in the context of granting or refusing peremptory challenges completely ignores the constitutional implications of this case. *See* 194 S.W.3d at 667 (App. 9) (citing *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 820 (Tex. 1980); *Perkins v. Freeman*, 518 S.W.2d 532 (Tex. 1974); *Tamburello v. Welch*, 392 S.W.2d 114 (Tex. 1965)). Where constitutional rights are implicated, as here, the analysis set forth in these peremptory strike cases is inapposite. Rather, courts must follow *Chapman v. California*, 386 U.S. 18 (1967).

In *Chapman*, this Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23. Later, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court distinguished between "trial errors" subject to harmless error review and "structural errors," which are not subject to harmless error analysis. Structural errors affect the "entire conduct of the trial from beginning to end." *Id.* at 309.

The vast majority of courts to consider whether "*Batson* errors" – which encompass procedural errors in applying *Batson* – are subject to harmless error analysis have found that such errors are structural. *Davis v. Sec'y for the Dep't of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003); *United States v. McFerron*, *supra*, 163 F.3d at 955-56 (noting that application of harmless-error analysis in the

Batson context "has been resoundingly rejected by every circuit court that has considered the issue" and refusing to apply harmless error where court erred in placing burden of persuasion during *Batson* hearing); *U.S. v. Serino*, 163 F.3d 91, 93 (1st Cir. 1998); *Tankleff v. Senkowski*, 135 F.3d 235, 248 (2d Cir. 1998); *U.S. v. Annigoni*, 96 F.3d 1132, 1142-43 (9th Cir. 1996); *Ford v. Norris*, 67 F.3d 162, 170 (8th Cir. 1995); *Rosa v. Peters*, 36 F.3d 625, 634 n.17 (7th Cir. 1994); *U.S. v. Broussard*, 987 F.2d 215, 221 (5th Cir. 1993); *Ramseur v. Beyer*, 983 F.2d 1215, 1225 n.6 (3d Cir. 1992); *U.S. v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987) (holding abuse of discretion in conducting ex parte examination of prosecutor's motives for excluding blacks from jury was not harmless error); *Holder v. State*, 124 S.W.3d 439, 452 (Ark. 2003); *see also* Ogletree, 31 AM. CRIM. L. REV. at 1122; Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001 (1998).

This Court has expressly recognized that discriminatory exercise of peremptory challenges harms interests in addition to those of the parties – namely, the interest of jurors in not being improperly excluded from service and the interest of the community in unbiased administration of justice. *See Georgia v. McCollum*, 505 U.S. 42, 48-50 (1992); *Powers*, 499 U.S. at 402; *Batson*, 476 U.S. at 87-88; *see also Davis*, 341 F.3d at 1317. As the Texas Court of Criminal Appeals has put it:

> As in *Powers* and *Edmonson*, the extension of *Batson*'s proscriptions is to remedy the harm done to the "dignity of persons" and the "integrity of the courts." The harm caused by a *Batson* violation is inflicted not only upon the parties but

> the excluded juror and the entire community as well.

Curry v. Bowman, 885 S.W.2d at 424 (internal citations omitted). In other words, if the court allows racial discrimination to infect jury selection by condoning such discrimination, the whole trial is affected because harm is done to the parties, the jury, the community, and the integrity of the courts. "The influence of the *voir dire* process may persist through the whole course of the trial proceedings." *Powers*, 499 U.S. at 412; *see also Ford v. Norris*, 67 F.3d at 171. Thus, the trial court's decision to reinstate defendant's racially-motivated peremptory challenge here is structural: It is impossible to determine to what extent the trial court's decision to condone and legitimize racial discrimination by rewarding it infected the whole process (including the impartiality of the jury and the integrity of the court itself) and prejudiced the Brooks, who are African-American, from the outset.

The court of appeals' opinion applying a harmless error analysis in this case is therefore error. Its point that the jury "was not selected by discriminatory means" is meaningless in the face of the precedent set forth above acknowledging that a court's involvement in a violation of the Equal Protection Clause (here, its reward of discriminatory behavior) can also infect a trial with racial bias in a manner that in and of itself is harmful. Thus, under *Chapman* and *Fulminante*, the trial court's reinstatement of defendant's racially-motivated peremptory strike cannot be considered harmless.

Although the vast majority of courts to consider this issue have come to the conclusion that harmless error analysis should not be applied in the context of *Batson* and

Edmonson, the court of appeals in this case and courts in several other states have disagreed, applying a harmless error analysis in the *Batson* context. *See, e.g., State v. Darnell*, 98 P.3d 617 (Ariz. Ct. App. 2004); *People v. Rodriguez*, 58 Cal.Rptr.2d 108 (1996). Notably, both of these decisions follow *Dawson v. Delaware*, 503 U.S. 159 (1992), in which Justice Blackmun in his concurrence noted that the Court had refused to impose a harmless error analysis in *Batson*. *See id.* at 169 (Blackmun, J., concurring). A definitive opinion on this issue is therefore needed in order to avoid errant decisions such as those cited above and the one in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2006

APPENDICES

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194 S.W.3d 661

Gercie BROOKS, Individually and as Personal Representative of the heirs and Estate of John B. Brooks, Jr., Deceased, Appellants,

v.

ARMCO, INC., et al., Appellees.

No. 06-04-00111-CV.

Court of Appeals of Texas,
Texarkana.

Submitted March 2, 2006.

Decided May 17, 2006.

Charles S. Siegel, Loren Jacobson, Ron C. Eddins, Waters & Kraus, LLP, Dallas, for appellants.

James M. Hall, Jr., Murphy Klasing, Kenneth C. Moursund, Jr., McGinnis, Lochridge & Kilgore, LLP, Houston, for appellees.

Before MORRISS, C.J., ROSS and CORNELIUS,* JJ.

OPINION

Opinion by Justice CORNELIUS.

Gercie Brooks, individually and as personal representative of the heirs and estate of John B. Brooks, Jr., deceased (Plaintiffs), appeal from a take-nothing judgment rendered against them in their suit against Armco, Inc.[1]

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* William J. Cornelius, Chief Justice, Retired, Sitting by Assignment

[1] Armco, Inc., has been succeeded by AK Steel, Inc.

(Defendant), seeking damages for the death of John B. Brooks, Jr. Plaintiffs alleged that Brooks, who worked for Armco for twenty-two years, died from mesothelioma caused by his exposure to products containing asbestos while at Armco's plant in Pasadena, Texas. Plaintiffs produced evidence that Brooks died from mesothelioma, but Armco produced medical evidence that Brooks died from adenocarcinoma, unrelated to asbestos exposure. The case was tried to a jury, which found against Plaintiffs on all issues.

On appeal, Plaintiffs contend generally that they are entitled to a new trial because the trial court erred in: failing to strike three prospective jurors for cause; improperly restricting the hearing on Plaintiffs' *Batson-Edmonson* challenges by limiting their cross-examination of the defense counsel and refusing to allow their attorney to examine defense counsel's voir dire notes; and allowing Defendant an extra peremptory challenge to replace the strike it used to remove a prospective juror on the basis of race. We overrule all of these contentions and affirm the judgment.

CHALLENGES FOR CAUSE

In the voir dire examination of the jury panel, Plaintiffs' counsel tried to explain the burden of proof that would be used in this case (preponderance of the evidence and clear and convincing evidence) by comparing it with the burden of proof in criminal cases (beyond a reasonable doubt). After a lengthy attempt to explain the "beyond a reasonable doubt" burden, Plaintiffs' counsel asked the panel members if any of them thought it should be the burden of the plaintiff in a civil damage suit. Panel members four,

five, and eleven indicated they thought the plaintiff in a civil suit should be required to prove his case beyond a reasonable doubt like in a criminal case. Defendant objected to Plaintiffs' counsel's confusing comparison of the different burdens of proof. In response, the trial court told the jury panel he would instruct it regarding the proper burden of proof in this case. The court did later instruct the jury on the proper burden of proof. After the trial court told the panel he would instruct it on the proper burden of proof in this case, both counsel for Plaintiffs and for Defendant further questioned the jury panel on the burden of proof and reiterated to it that the trial court would instruct it on the proper burden. In this further questioning, none of the panel members, including those who had earlier expressed a preference for the higher burden of proof, answered or indicated they would not follow the court's instruction or would require a higher burden on Plaintiffs than the court instructed them.

Plaintiffs contend panel members four, five, and eleven expressed a bias as to the burden of proof and were therefore subject to challenge for cause. But expressions indicating a bias that are equivocal at most are not absolute grounds for disqualification. And an initial leaning toward a particular view is not disqualifying if it represents skepticism or uncertainty rather than an unshakeable conviction. *Cortez, ex rel. Puentes v. HCCI-San Antonio,* 159 S.W.3d 87, 94 (Tex.2005). For a bias to disqualify a juror, it must appear that the state of mind of the juror leads to the natural inference that he will not or cannot act with impartiality. *Goode v. Shoukfeh,* 943 S.W.2d 441, 453 (Tex.1997). Statements or indications of bias may be the result of inappropriate leading questions, confusion, misunderstanding, or ignorance, and veniremembers are not

necessarily subject to challenge for cause when they indicate a bias so long as the rest of the record shows that is not the case. *Cortez, ex rel. Puentes,* 159 S.W.3d at 93. In reviewing the trial court's decision on challenges for cause, we must consider the entire examination, not just answers that favor one side over the other. Trial judges are better able to evaluate a juror's sincerity and capacity for fairness, and they have the discretion whether to strike a panel member for cause when bias is not established as a matter of law. *Id.*; *see also Compton v. Henrie,* 364 S.W.2d 179, 184 (Tex.1963).

From a review of the entire record, we find that panel members four, five, and eleven were not biased as a matter of law, and the trial court did not abuse its discretion in refusing to strike them for cause. A reasonable construction of the record is that the prospective jurors in question simply stated what they thought the law ought to be on the burden of proof requirement, but when the trial court explained that it would instruct them as to the burden of proof required in this case, they indicated to counsel for both sides that they had no problem applying the burden of proof the court said they must use and that they would not try to apply any higher burden of proof. None indicated they could not or would not follow the law on the burden of proof as given to them by the trial court.

THE *BATSON-EDMONSON* HEARING

Plaintiffs made a *Batson-Edmonson* challenge because of four panel members who were peremptorily challenged by Defendant's attorney. Plaintiffs complain of the trial court's manner of conducting the *Batson-Edmonson* hearing, contending that the court improperly curtailed

their cross-examination of defense counsel about the race-neutral reasons he gave for striking several African-American panel members and that the court refused to allow Plaintiffs' counsel to examine the notes made by defense counsel at voir dire.

Plaintiffs objected to defense counsel's striking panel members nine, ten, twenty-three, and twenty-eight, all of whom were African-American. In *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held it was a constitutional violation to use peremptory challenges in a criminal trial to exclude members of the jury panel on the basis of their race. The court extended the rule of *Batson* to civil cases in *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). When a *Batson* or *Edmonson* challenge is made, the court must follow a three-step procedure. First, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. Second, the party who exercised the peremptory challenge must come forward with a race-neutral explanation for the challenge. Third, the trial court must determine if the party challenging the strike has proven racial discrimination. At this step, the court should provide the party asserting objections with a reasonable opportunity to conduct cross-examination. *Goode,* 943 S.W.2d at 445, 452.

Plaintiffs contend the trial court failed to give them a reasonable opportunity to cross-examine defense counsel about his race-neutral explanations. We disagree. The trial court freely allowed Plaintiffs to cross-examine Defendant's counsel. Plaintiffs' counsel questioned defense counsel about his reasons for striking some of the African-American panel members, and defense counsel explained

and reiterated his reasons. Defense counsel was cross-examined about the four panelists he challenged, as well as others on the panel that he did not strike. At one point in Plaintiffs' cross-examination, the trial court commented that it was nearing 5:00 in the afternoon and he wanted to let the jury go before it got too late. Plaintiffs' counsel demurred and said he wanted more time to cross-examine defense counsel. The trial court said he could have five more minutes. The trial court then stated he was going to overrule the objections to the defense's strike of three of the panel members, but he was going to sustain the objection to one of the strikes. Plaintiffs' counsel again asked for more time to cross-examine. The court replied that counsel could continue the cross-examination the next morning if he wanted additional time, but counsel replied, "I'm not going to request that. I'm going to get through this as quick as I can."

The trial court has great discretion concerning the conduct of the trial. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 240 (Tex.2001). The court should provide a party objecting to allegedly racially motivated challenges a reasonable opportunity to cross-examine opposing counsel about his reasons for striking panel members, but courts in *Edmonson* hearings should also take care to prevent unnecessary disruption in the trial courts. *Goode,* 943 S.W.2d at 452.

We find the trial court did not abuse his discretion in limiting Plaintiffs' cross-examination at the *Edmonson* hearing. Plaintiffs adequately explored defense counsel's reasons for striking the panel members, as well as his reasons for not striking others. Moreover, when the trial court offered to give Plaintiffs more time to continue the

cross-examination the next day, their counsel refused. We find no error.

Plaintiffs also complain the trial court refused to let their counsel examine the notes defense counsel took at voir dire. In an *Edmonson* hearing, the movant has a right to examine the voir dire notes of the opponent's counsel only if that counsel relies on his notes to refresh his memory while giving testimony. *Id.* at 449; *Pondexter v. State,* 942 S.W.2d 577, 582 (Tex.Crim.App.1996). Defense counsel here referred to his voir dire notes several times during his direct testimony and on cross-examination, but it appears he was only citing the notes to confirm the truth of his testimony, rather than using the notes to refresh his memory. Even if this constituted "use" of the notes to refresh his memory, we believe it is immaterial because the trial court examined the notes in camera and verbally related their contents to Plaintiffs' counsel, who then used the references in his cross-examination. If there was any error in the way the trial court handled this matter, we find it was clearly harmless.

Finally, Plaintiffs assert it was reversible error for the trial court to allow the defense an extra peremptory challenge. The court ruled that defense counsel improperly struck one of the panelists for discriminatory reasons. The trial court restored that panel member to the jury and allowed the defense another peremptory challenge to replace the challenge that had been voided. Plaintiffs contend that allowing the extra peremptory challenge was error because it "rewarded" Defendant for using race-based discrimination. Plaintiffs rely on *Peetz v. State,* 180 S.W.3d 755 (Tex.App.-Houston [14th Dist.] 2005, no pet.), to support their position, but we find that case distinguishable. In *Peetz,* the defendant, who is white, used

every peremptory challenge he had to remove every African-American person available to be on the jury. The court upheld one of the strikes as being race neutral, but voided two strikes, on panelists six and ten, and placed those two on the jury. The defendant then asked the trial court to grant him two additional peremptory challenges to replace the two he used that had been voided, but the trial court refused. On appeal, the Fourteenth District Court of Appeals recognized that, when a court finds a *Batson* violation, it may in its discretion fashion an appropriate remedy and that the trial court there did not abuse its discretion in refusing to give the defendant extra strikes, because the defendant deliberately used his strikes to discriminate against all African-American panelists and the trial court could properly penalize him for his deliberate discrimination against all African-Americans. The case here is strikingly different from *Peetz*. Here, the evidence before the trial court in the *Edmonson* hearing could reasonably have been construed by the trial court as showing that the improperly struck juror was not excluded because of deliberate prejudice against African-Americans, but, rather, as the result of an error of judgment as to what properly constituted race-neutral reasons. Such a conclusion is buttressed by the fact that there were two other blacks on the panel in this case whom defense counsel made no attempt to strike, but who were readily accepted by the defense and served as jurors.

It is a policy of this State that both parties be allowed no fewer peremptory challenges than the minimum number allowed them by our rules and statutes, unless the trial court in its discretion finds a compelling reason to allocate them otherwise. *State, ex rel. Curry v. Bowman,*

885 S.W.2d 421, 425 (Tex.Crim.App.1993); *see also Perez v. State,* 171 Tex.Crim. 505, 351 S.W.2d 234 (1961); *Truong v. State,* 782 S.W.2d 904 (Tex.App.-Houston [14th Dist.] 1989, pet. ref'd). Although *Perez* is a pre-*Batson* case, *Curry v. Bowman* and *Truong v. State* are post-*Batson* cases, and *Curry* specifically involved a *Batson* violation.

Additionally, if it was error for the trial court to replace Defendant's peremptory challenge, it was clearly harmless. The jury verdict in this case was unanimous – twelve to none for Defendant. A vote of ten members would have been sufficient. If the trial court had refused to restore Defendant's peremptory challenge, there still would have been eleven votes for the Defendant. Even if one other juror changed his mind and voted for Plaintiffs, the result still would have been a ten-to-one verdict for Defendant. The harmless error rule specifically applies to errors in granting or refusing peremptory challenges. In order to secure a reversal, the complaining party must show that the error made the trial materially unfair. *Lorusso v. Members Mut. Ins. Co.,* 603 S.W.2d 818, 820 (Tex.1980); *Perkins v. Freeman,* 518 S.W.2d 532 (Tex.1974); *Tamburello v. Welch,* 392 S.W.2d 114 (Tex.1965). Plaintiffs have not made such a showing here.

Plaintiffs cite *Batiste v. State,* 888 S.W.2d 9, 13-14 (Tex.Crim.App.1994), to argue that the harmless error rule does not apply in *Batson* cases, but that case does not support their position. In *Batiste,* the Texas Court of Criminal Appeals assumed, without deciding, that a "*Batson* error" is not amenable to a harm analysis. But the kind of *Batson* error the court was speaking about in *Batiste,* and the error that was present in that case, was the error of an ineffective trial counsel failing to preserve error and thus allowing a jury that was selected by racially discriminatory

methods to sit in judgment of a case. That did not occur in this case. The jury was not selected by racially discriminatory means. The alleged error was in allowing the defense the full complement of strikes allowed by law – not the allowance of a jury selected by discriminatory means to decide the case.

For all the reasons stated, we overrule Plaintiffs' contentions and affirm the judgment.

NO. 65121

GERCIE BROOKS, Individually and as Personal Representative of the Heirs and Estate of John B. Brooks, Jr., Deceased	§	IN THE DISTRICT COURT OF
	§	LAMAR COUNTY, TEXAS
v.	§	6TH JUDICIAL DISTRICT
ARMCO, INC., ET AL.	§	

FINAL JUDGMENT

(Filed Jul. 12, 2004)

On June 4, 2004, the Court called this case for trial and both sides announced ready for trial. At trial, plaintiff, Gercie Brooks, individually and as personal representative of the heirs and estate of John B. Brooks, Jr., deceased, appeared in person and through her attorney of record, Ron Eddins. Defendant, AK Steel Corporation, formerly known as Armco Inc., appeared through its representative and through its attorneys of record, James M. Hall and Murphy S. Klasing. The Court impaneled and swore the jury, which heard the evidence and arguments of counsel. On June 18, 2004 the Court submitted questions, definitions, and instructions to the jury. In response, the jury rendered its verdict, which the Court received, filed and entered of record. Defendant moved for judgment on the verdict. The Court considered the motion and hereby renders judgment for Defendant.

Therefore, in accordance with the jury's verdict, the Court orders that Plaintiff, Gercie Brooks, individually and as personal representative of the heirs and estate of John B. Brooks, Jr., deceased, take nothing by her suit

and that defendant, AK Steel Corporation, formerly known as Armco Inc., recover court costs from Plaintiffs.

The Court denies all relief not granted in this judgment.

SIGNED on this 12 day of July, 2004.

/s/ Scott McDowell
JUDGE PRESIDING

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 **(512) 463-1312**

September 22, 2006

Ms. Loren Jacobson
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RE: Case Number: 06-0564
Court of Appeals Number: 06-04-00111-CV
Trial Court Number: 65121

Style: GERCIE BROOKS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN B. BROOKS, JR., DECEASED
v.
ARMCO, INC.

Dear Counsel:

Today the Supreme Court of Texas denied as re-drafted the petition for review in the above-referenced case.

Sincerely,

/s/ Blake A. Hawthorne
Blake A. Hawthorne, Clerk

by Claudia Jenks, Chief Deputy Clerk

cc: Ms. Debbie Autrey
Marvin Ann Patterson